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IN THE

Supreme Court of the United States

OCTOBER TERM 1964

No. 945

STATES STEAMSHIP CO., a Corp.,
Petitioner,

v.

AMERICAN SMELTING & REFINING CO., a Corp.,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

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IN THE

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

Question Presented

Is a cargo owner's action for reimbursement from a shipowner for salvage paid to a third party a claim for "loss or damage" within the meaning of, and hence time-barred by, Section 3(6) of the Carriage of Goods By Sea Act, 1936?[1]

Statute Involved

Section 3(6) of the Carriage of Goods By Sea Act, 1936[2] is set forth in full in the Court of Appeals' opinion, appended to the Petition.[3]

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[1] 46 U. S. C. §§ 1300-1315, 49 Stat. 1207-1213.
[2] 46 U. S. C. § 1303(6), 49 Stat. 1208.
[3] Appendix to Petition, pp. 3-4.

Statement of the Case

The law imposes upon a shipowner a non-delegable duty to use due diligence to make his vessel seaworthy at the inception of the voyage.[4] Petitioner's admitted failure to do this necessitated the services of a third-party salvor.

Petitioner signed a Lloyd's "NO CURE—NO PAY" Salvage Agreement with the salvor providing for arbitration of the salvage award at London.[5] The Salvage Agreement was and is not subject to or governed by the Carriage of Goods by Sea Act. It was and is wholly independent of and separate and apart from the bill of lading contract of affreightment issued by petitioner to respondent.

Upon completion of the salvage services, *petitioner* gave security to the salvor thereby releasing the latter's lien,[6] the vessel resumed her voyage and respondent's cargo was duly delivered *intact*. A few days before delivery, respondent signed an Average Agreement which is irrelevant, since respondent agreed to do no more than it was obligated to do in any event—pay its ratable portion of salvage, general average or other expenses for which it might be liable according to established usages and laws.[7]

The arbitrators' award was handed down and paid approximately 20 months after the delivery of the cargo. This suit was filed within five months thereafter.[8]

The remaining facts are summarized in the Court of Appeals' opinion.[9]

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[4]46 U. S. C. § 1303(1)(a), 49 Stat. 1208; see footnote 1 to Opinion, Appendix to Petition, pp. 5-6.

[5]Record-II, p. 9, ¶ 1.

[6]Id. at p. 10, ¶ 5.

[7]Id. at p. 16.

[8]Record-I, p. 19.

[9]Appendix to Petition, pp. 1-3.

ARGUMENT

Certiorari should be denied for the following reasons:

I. THE PETITION PRESENTS NO QUESTIONS FOR REVIEW.

The "Questions Presented" in the Petition[10] do not specify any *grounds* for review, i.e., they are not expressed in the terms and circumstances of the case, as is required by the Rule.[11]

Under "Argument" petitioner asserts the "key" question to be: "When did Shipper's cause of action arise?"[12] This point is academic:

The question which is dispositive of the case is this: Is this a claim for "loss or damage" within the meaning of COGSA § 3(6)?[13]

The Court of Appeals, following *Goulandris Bros.* v. *B. Goldman & Sons, Ltd.*,[14] answered the foregoing question "NO", because taken in the context of COGSA, "loss or damage" relates only to claims for breach of the shipowner's obligation to make a proper delivery of the goods.[15] Therefore, it is immaterial when respondent's cause of action arose. COGSA § 3(6) simply has no application because respondent's claim doesn't involve faulty delivery.

The fact—not present in *Goulandris*[16]—that this is an indemnity action which didn't accrue until after the one

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[10]Petition, p. 2.

[11]Rule 23 (1)(c); see also *Seaboard Air Line Ry. Co.* v. *Watson*, 287 U. S. 86 (1932).

[12]Petition, p. 7.

[13]See Appellant's Opening Brief, p. 8; Appellant's Reply Brief, p. 2.

[14][1957] 2 Lloyd's List L. R. 207 (Q. B.).

[15]Appendix to Petition, p. 4.

[16]*Goulandris Bros., Ltd.* v. *B. Goldman & Sons, Ltd.*, *supra*, note 14, concerned a claim for refund of general average previously paid to the carrier; therefore, only two parties were concerned and it was not an indemnity situation.

year period of § 3(6) had run, was used by the Court of Appeals merely to illustrate the absurdity of petitioner's contention below that "loss or damage" as used in § 3(6) includes *any* cargo owner's claim based on a breach of the contract of affreightment.[17]

Thus, the only question posed to the Court by petitioner involves a collateral point made by the Court of Appeals to demonstrate that the construction put on "loss or damage" by petitioner is both illogical and inequitable. The correctness of the *decision* of the Court of Appeals is unquestioned. Hence, no question is presented for review by this Court.

II. THERE IS NO CONFLICT OF DECISION.

The Court of Appeals followed the decision of the English Court in *Goulandris Bros. Ltd.* v. *B. Goldman & Sons, Ltd.*[18] wherein it was held that the "loss or damage" referred to in § 3(6)[19] is limited to loss or damage which is related to the cargo owner's goods. Both here and in *Goulandris* a cargo owner was suing for reimbursement for an extra expense imposed upon him by a peculiar feature of the maritime law—salvage in our case, general average in *Goulandris*—unrelated to the shipowner's duty to make a proper delivery of the goods. Both here and in *Goulandris* the goods were subject to being held under lien—there for general average, here for salvage services—until some arrangement was made for their release. In

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[17]Appendix to Petition, p. 7.

[18]Note 14, *supra*.

[19]*Goulandris Bros., Ltd.* v. *B. Goldman & Sons, Ltd., supra*, Note 14, concerned a bill of lading subject to the Hague Rules, otherwise known as the Brussels Convention of 1924, 51 Stat. 233. § 3(6) of the Hague Rules is substantially the same as COGSA 3(6).

each case the court held there had been no "loss or damage" within § 3(6) because the respondent's goods were duly delivered and there was no loss or damage of or to, or in connection with them.[20]

Petitioner apparently hopes (by ignoring it) to gloss over the fact that, in deciding the "ultimate question involved in this appeal,"[21] the Court of Appeals followed the only other case germane to the issue. In essence, petitioner seeks to create a conflict on a question of international law on which there is now uniformity.

III. THE QUESTION PRESENTED IS NEITHER NOVEL NOR IMPORTANT.

Despite the long history and widespread adoption of the Hague Rules[22] embodied in COGSA, we know of no other case in which the question posed by the stipulated facts has been litigated. It was raised but then *abandoned* by shipowner's counsel in *U. S.* v. *Wessel, Duval & Co.*[23] We can only conclude (a) that petitioner's contention is frivolous or (b) that the factual situation with which we are concerned occurs so infrequently as to be of little importance to the maritime world.[24]

IV. THE DECISION BELOW IS CORRECT.

As we have pointed out, the decision of the Court of Appeals on the one issue which is dispositive of this case

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[20]Id. at p. 22; Opinion, Appendix of Petition, p. 4.

[21]Appellant's Reply Brief, p. 2.

[22]"Forty-four nations, including virtually every commercial and seafaring country of the world, Russia and China excepted, have adopted or made the provisions of the Brussels Convention of 1924 a part of their domestic law." Appellant's Opening Brief, p. 5.

[23]115 F. Supp. 678 (S. D. N. Y. 1953).

[24]Most marine disasters requiring salvage arise out of errors in navigation or fire, with respect to which the carrier is exempt from liability. 46 U. S. C. § 1304(2) (a) & (b); 49 Stat. 1210.

is so unassailable that petitioner ignores it. Instead petitioner raises this academic point: "When did Shipper's cause of action arise",[25] or, more specifically, when does a claim arise for reimbursement for salvage paid to a third party? This question was resolved adversely to petitioner's contention in *Tice Towing Line* v. *James McWilliams Blue Line*,[26] cited by the Court of Appeals.

The question posed to the Court by petitioner arises only because of petitioner's dogged refusal to acknowledge that which was made clear in *Tice*: An ordinary cause of action for breach of contract involves two parties both of whom are before the court; while an indemnity action involves *three* parties, *one* of whom is *not* before the court and, hence, cannot be bound by it. Therefore, payment to the third party is necessary before an indemnity claim arises.[27]

CONCLUSION

For the foregoing reasons it is respectfully submitted that the petition for Writ of Certiorari should be denied.

Respectfully Submitted,

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March 18, 1965

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[25] Petition, p. 7.
[26] 51 F. 2d 243 (S. D. N. Y. 1931), modified 57 F. 2d 183 (2d Cir., 1932).
[27] Id. at p. 245.

CERTIFICATE OF SERVICE

Service of the within Brief in Opposition was made upon Counsel for Petitioner in the following manner:

By mailing air mail six copies thereof on March 18, 1965 to Lillick, Geary, Wheat, Adams & Charles, 311 California Street, San Francisco, California 94104, attention Graydon S. Staring, counsel for Petitioner.

WILLIAM GARTH SYMMERS